Bathamani a/p Suppiah v Southern Finance Co Bhd

HIGH COURT (IPOH) — BANKRUPTCY NO 29-349 OF 1998
PS GILL J
9 JULY 1999

Bankruptcy *— Creditor's petition — Defect as to title heading — Described as 'Permohonan Pemiutang' instead of 'Petisyen Pemiutang' — Whether judgment debtor misled by misdescription — Whether proceedings invalidated by defect*

Bankruptcy *— Petition — Opposition to petition — Creditor's petition and affidavit verifying petition dated earlier than date petition was filed — Whether affidavit verifying petition valid*

Bankruptcy *— Receiving and adjudicating orders — Appeal against — Sanction of official assignee not obtained — Whether appellant had legal capacity to lodge appeal*

Civil Procedure *— Affidavits — Defective affidavit — Affidavit did not state deponent's place of residence or occupation in accordance with O 41 r 1(4) of Rules of the High Court 1980 — Whether defect was irregularity as to form only — Rules of the High Court 1980 O 41 r 4*

The judgment creditor filed their creditor's petition on 18 September 1998 which was dated 29 August 1998 with an affidavit verifying the petition annexed thereto dated 29 August 1998. At the hearing of the creditor's petition, the judgment debtor contended that the creditor's petition was invalid due to the fact that the affidavit verifying the petition was made before the petition came into existence. The registrar held that as long as the affidavit verifying the petition was attached to the petition when it was filed, there was no flaw to the petition or affidavit and the receiving and adjudicating orders were made. The judgment debtor appealed. The judgment debtor also raised the fact that the creditor's petition was described as 'Permohonan Pemiutang' instead of 'Petisyen Pemiutang' and also that the deponent of the affidavit verifying the petition had not complied with O 41 r 1(4) of the Rules of the High Court 1980 ('the RHC'), in that, he had not stated the place of his residence and his occupation in the affidavit.

Held, dismissing the appeal:

(1) The appellant lacked the legal capacity to lodge the appeal as a receiving and adjudicating order against the judgment debtor had been made and the sanction of the official assignee had not been obtained. The deliberate omission by the legislature in regard to appeals or stay in ss 92(1) and 105(1) of the Bankruptcy Act 1967 ('the Act') would mean that unlike provisions for review, rescinding, varying of annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official

assignee should be obtained (see p 430E, G–H); *Re Low Kok Tuan; ex p Arab-Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185 followed.

(2) Nowhere in the Act or the Bankruptcy Rules 1969 ('the Rules') was it stated that the affidavit verifying the petition had to be affirmed after the filing or the presentation of a petition. Section 6(1) of the Act required that the statements contained in the petition be verified as to their truth. A deponent could only depose as to the truth of the facts that were existing or have existed and if the statements had been placed before the deponent and were within the deponent's knowledge before the deponent swore the affidavit, the deponent must have sworn to its truth. On the facts, the statements in the present petition were dated 29 August 1998 and the affidavit verifying those facts was also dated the same date (see p 431C–E).

(3) The description of the creditor's petition as 'Permohonan Pemiutang' instead of 'Petisyen Pemiutang' did not in anyway vitiate the creditor's petition, as there was no intention to mislead and the judgment debtor was not in fact mislead by this misdescription. At most, this defect was a formal defect and by the provisions of s 131 of the Act, the said proceedings were not invalidated by the defect (see p 432C–D).

(4) With regard to the non compliance of O 41 r 1(4) of the RHC in relation to the deponent not stating the place of his residence and his occupation in the affidavit, despite the fact that there may have been an apparent defect to the affidavit, the affidavit was allowed pursuant to O 41 r 4 RHC as it was an irregularity in form only (see p 432D–E).

[Bahasa Malaysia summary

Pemiutang penghakiman telah memfailkan petisyen pemiutang pada 18 September 1998 yang bertarikh 29 Ogos 1998 dengan suatu affidavit menentusahkan petisyen yang dilampirkan bersama bertarikh 29 Ogos 1998. Semasa perbicaraan petisyen pemiutang, penghutang penghakiman menegaskan bahawa petisyen pemiutang adalah tidak sah kerana affidavit menentusahkan petisyen telah dibuat sebelum petisyen tersebut wujud. Pendaftar memutuskan bahawa selagi affidavit menentusahkan petisyen dilampirkan bersama petisyen semasa ia difailkan, tiada kecacatan kepada petisyen tersebut atau affidavit dan maka perintah-perintah penerimaan dan penghukuman telah dibuat. Penghutang penghakiman telah merayu. Penghutang penghakiman juga membangkitkan fakta bahawa petisyen pemiutang dinyatakan sebagai 'Permohonan Pemiutang' dan bukannya 'Petisyen Pemiutang' dan juga deponen affidavit menentusahkan petisyen tersebut tidak mematuhi A 41 k 1(4) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), di mana, beliau tidak menyatakan tempat tinggalnya dan juga pekerjaannya di dalam affidavit tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Perayu kekurangan kapisiti undang-undang untuk membuat rayuan kerana perintah penerimaan dan penghukuman terhadap penghutang penghakiman telah dibuat dan kebenaran Pegawai Pemegang Harta belum lagi diperoleh. Ketinggalan yang disengajakan oleh perundangan berkenaan dengan rayuan-rayuan atau penggantungan di dalam ss 92(1) dan 105(1) Akta Kebankrapan 1967 ('Akta tersebut') bermakna bahawa berbanding dengan peruntukan mengkaji semula, pembatalan, atau perubahan atau pembatalan perintah kebankrapan, bagi tujuan merayu terhadap perintah kebankrapan, kebenaran Pegawai Pemegang Harta sepatutnya diperoleh (lihat ms 430E, G–H); *Re Low Kok Tuan; ex p Arab-Malaysia Merchant Bank Bhd* [1997] 4 CLJ diikut.

(2) Akta atau Kaedah-Kaedah Kebankrapan 1969 ('kaedah-kaedah tersebut') tidak menyatakan bahawa affidavit menentusahkan petisyen mestilah diikirarkan selepas pemfailan atau pengemukaan petisyen tersebut. Seksyen 6(1) Akta tersebut memerlukan bahawa kenyataan-kenyataan yang terkandung di dalam petisyen ditentusahkan berkenaan dengan kebenarannya. Seorang deponen hanya boleh mendeposkan berkenaan dengan kebenaran fakta-fakta yang wujud atau telah wujud dan jika kenyataan telah dikemukakan di hadapan deponen dan berada di dalam pengetahuan deponen sebelum deponen bersumpah afidavit tersebut. Di atas fakta-fakta, kenyataan-kenyataan di dalam petisyen ini bertarikh 29 Ogos 1998 dan affidavit yang menentusahkan fakta-fakta tersebut juga bertarikh pada tarikh yang sama (lihat ms 431C–E).

(3) Gambaran petisyen pemiutang sebagai 'Permohonan Pemiutang' dan bukannya 'Petisyen Pemiutang' tidak dengan sebarang cara sekalipun membatalkan petisyen pemiutang, kerana tiada niat untuk memperdaya dan penghutang penhakiman secara fakta tidak diperdayakan dengan gambaran yang salah ini. Walau apa sekalipun, kecacatan ini adalah kecacatan rasmi dan menurut peruntukan s 131 Akta tersebut, prosiding-prosiding tersebut tidak dibatalkan oleh kecacatan tersebut (lihat ms 432C–D).

(4) Berkenaan dengan ketidakpatuhan A 41 k 1(4) KMT berkenaan dengan deponen tidak menyatakan tempat tinggalnya dan juga pekerjaannya di dalam afidavit, walaupun fakta bahawa mungkin terdapat kecacatan jelas kepada afidavit, afidavit tersebut dibenarkan menurut A 41 k 4 KMT kerana ia adalah ketidakpatuhan dari segi bentuk sahaja (lihat ms 432D–E).]

Notes

For a case on verifying affidavit for creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 1634.

For a case on appeal against receiving and adjudicating order, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) para 2013.
For cases on contents of affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 233–241.

Cases referred to

Ho Weng Keong, Re; ex p Marketlink (M) Sdn Bhd [1993] 1 MLJ 60 (refd)
Khoo Kim Hock, Re [1974] 2 MLJ 29 (refd)
Low Kok Tuan, Re; ex p Arab-Malaysia Merchant Bank Bhd [1997] 4 CLJ 185 (folld)
Ooi Thean Chuan v Banque Nationale de Paris [1992] 2 MLJ 526 (refd)

Legislation referred to

Bankruptcy Act 1967 ss 6(1), 38(1)(a), 92(1), 105(1), 131
Bankruptcy Rules 1969 r 106, Form 11
Rules of the High Court 1980 O 41 rr 1(4), 4, O 92 r 1

Bachan Singh (*Bachan & Katar*) for the judgment debtor.
Fredrick I Nicholas (*Jeyaratnam & Chong*) for the judgment creditor.

PS Gill J: At the outset, I wish to make a pertinent observation of a point not canvassed by both the learned counsel for judgment debtor, or creditor, as to whether the judgment debtor had the legal capacity to appeal in the light of the fact that the learned registrar, had on 3 June 1999, made a receiving and adjudicating order against the said judgment debtor. In my judgment it is trite law, that upon a person being adjudged a bankrupt all his affairs are vested with the official assignee. I am mindful of the case of the *Re Khoo Kim Hock* [1974] 2 MLJ 29 which merely says that the prohibition of s 38(1)(a) Bankruptcy Act 1967 does not exclude a bankrupt from applying for a review, rescinding, or varying the order of bankruptcy under O 92 r 1 Rules of the High Court 1980, or s 105(1) of the Act, but the case is silent on the bankrupt's capacity to appeal, or for that matter to apply to stay proceedings, without the sanction of the official assignee. This issue was equally ventilated by my learned brother Low Hop Bing J in the case of *Re Low Kok Tuan; ex p Arab-Malaysia Merchant Bank Bhd* [1997] 4 CLJ 185. Like my brother judge I am equally of the view, that this deliberate omission by the legislature in regard to appeals or stay in ss 92(1) and 105(1) of the Act, would mean only one thing, that unlike provisions for review, rescinding, varying of annulling a bankruptcy order, for purposes of appeal against a bankruptcy order, sanction of the official assignee should be obtained. That being the case, I hold for the present the appellant lacks the legal capacity to lodge the appeal.

Assuming I am wrong on this, the present appeal before me raises a perennial issue vis a viz whether affirming an affidavit verifying the creditor's petition before the filing, or presentation of the petition, rendered the creditor's petition invalid. This was to my mind the most crucial issue

A on appeal. This argument did not find favour with the learned registrar who had held that despite the fact that the affidavit verifying the petition was affirmed before the creditor's petition was filed, or presented, as long as the creditor's petition was attached, or bound to the affidavit, verifying the petition, when it was filed on 18 September 1998, there was no flaw in the affidavit, or the petition.

B

Briefly stated in these bankruptcy proceedings the creditor's petition was dated 29 August 1998 and the affidavit verifying this said petition was affirmed on the same day, ie 29 August 1998. Both the petition and the affidavit, were presented to this court on 18 September 1998.

C The main argument of the judgment debtor's counsel was that the affidavit verifying the petition was bad as it was sworn before the petition came into existence.

Section 6(1) of the Act states, 'A creditor's petition shall be verified by affidavit of the creditor or ...'. It is the statements contained in the petition that are required to be verified as to their truth. As I understand it, a D deponent can only depose as to the truth of the facts that are existing or have existed. Now the facts on statements in the present petition were dated 29 August 1998 and the affidavit verifying those facts is also dated the same date, and one of its paragraph is worthy of reproduction 'Bahawa tiap-tiap satu pernyataan dalam permohonan tersebut adalah benar pada pengetahuan saya sendiri'. It cannot be gainsaid that all the statements were E already before the deponent at the time when he affirmed the affidavit.

On a scrutiny of the Act or the Bankruptcy Rules 1969 ('the Rules'), nowhere is it stated that the affidavit verifying the petition must be affirmed after the filing or presentation of a petition. If in every case, the Act or Rules demand that the affidavit shall be affirmed and filed only after the F presentation of the creditor's petition, then it shall be so stated. The language in Form 11 of the Rules read together with s 6(1) of the Act and r 106 of the Rules, clearly shows that the petition has to be annexed to the verifying affidavit; the petition must be tied to or affixed to, or stapled to the verifying affidavit, so as to avoid dispute as to what is exactly been verified. I have every reason to believe and neither was it ever contested that both the G petition and the verifying affidavit were affixed to each other, and presented for filing on the same day, which is on 18 September 1998. To this extent I agree with the view of Edgar Joseph Jr J (as he then was) in *Ooi Thean Chuan v Banque Nationale de Paris* [1992] 2 MLJ 526 that, for presentation of the petition, the petition has to be annexed to the verifying affidavit.

H On the facts of the case before me, it was the judgment debtor's counsel submission that the affidavit verifying the petition has no effect and cannot verify the creditor's petition, notwithstanding the fact, that those statements had presumably been placed before the deponent, and were within his knowledge before he swore the affidavit. To my mind if those statements had been placed before the deponent and were within his knowledge before I he swore the affidavit, surely, he must have sworn to the truth and therefore there was absolutely no reason for refusing to accept the affidavit. At the risk of repetition, since both the petition and the affidavit are together before the

court, there is in my view no flaw in the affidavit. As such, to quote an extract from Lamin J (as he then was) in the *Re Ho Weng Keong; ex p Marketlink (M) Sdn Bhd* [1993] 1 MLJ 60 at p 63E, '... I am not prepared to take the life of this newly born babe, the petition, by striking it out on the ground that its apparent life support system, the affidavit, has been alleged to be technically faulty'.

As a precautionary measure, despite my ruling that the affidavit verifying the petition was valid in law, I had ruled that a second verifying affidavit should be filed to correct if at all there were any infirmities in the first affidavit verifying the petition.

For these reasons I dismissed this submission of the judgment debtor counsel.

The judgment debtor's counsel had also raised the fact that the creditor's petition, was described in Malay, vide encl 5, as 'Permohonan Pemiutang', when in fact the proper interpretation should have been 'Petisyen Pemiutang'. This may be so, but I held that it did not an anyway vitiate the creditor's petition, as there was no intention to mislead and the judgment debtor was not in fact mislead by this misdescription. At most, I consider this defect to be a formal defect and by the provisions of s 131 of the Act the said proceedings are not invalidated by this defect.

Judgment debtor's counsel, had also raised the issue, that the deponent of the affidavit verifying the petition, vide encl 4, had not complied with O 41 r 1(4) RHC, in that, he had not stated the place of his residence and his occupation in the said affidavit. To this argument I am of the view that despite the fact that there may be an apparent defect to the said affidavit, I had pursuant to O 41 r 4 RHC allowed the affidavit in, as it was an irregularity in form only.

For these reasons I dismissed the appeal and confirmed the adjudicating and receiving order made against the bankrupt.

Appeal dismissed.

Reported by Chin En Tek